UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

RAYMOND INTERIOR SYSTEMS **and** **SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL NO. 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES AFL-CIO** **UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1506**	**Case 21-CA-37649**
and **SOUTHERN CALIFORNIA PAINTERS AND ALLIED TRADES DISTRICT COUNCIL NO. 36 , INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO** **and** **SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (Party in Interest)**	**Case 21-CB-14259**

RESPONDENT RAYMOND INTERIOR SYSTEMS, INC.'S STATEMENT OF POSITION

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Pursuant to the Board's June 28, 2016 letter, Raymond Interior Systems, Inc. ("Raymond") submits its Statement of Position with respect to the issues raised by the remand of the above-captioned cases by the Court of Appeals for the District of Columbia Circuit in Raymond Interior Systems, Inc. v. NLRB, 812 F.3d 168 (D.C. Cir. 2016).

I. STATEMENT OF POSITION

First, for the reasons set forth in Raymond's Motion for Reconsideration, its Statement of Exceptions to Decision of the Administrative Law Judge, Exception Nos. 35-45, and its Brief in Support of Exceptions to Decision of the Administrative Law Judge, pp. 23-30, a lawful 8(f) agreement existed between Raymond and the Carpenters based on their Confidential Settlement Agreement. This 8(f) agreement became effective October 1, 2006, and covered the drywall finishing employees previously represented by the Painters. Moreover, this 8(f) agreement was not vitiated by 8(a)(2) conduct occurring on October 2 after the effective date of the 8(f) agreement under long-standing Board precedent in Zidell Explorations, Inc., 175 NLRB 887 (1969). The Board's appellate counsel never contended that this 8(f) agreement violated 8(a)(2). As the D.C. Circuit pointed out, the facts in this matter are materially indistinguishable from those in Zidell and the authorities relied upon by the Board in Zidell.

Here, under the Confidential Settlement Agreement, Raymond and the Carpenters lawfully agreed to apply the Carpenters' agreement to the drywall finishing employees upon expiration of the Painters' 8(f) agreement. This conduct, which allowed the drywall finishing employees to be covered by a union agreement giving wage increases and improved benefits, should be encouraged, not punished. Applying the Carpenters' agreement to the drywall finishing employees on a Section 8(f) basis did nothing to take away the employees' free choice to select a bargaining representative. If the Painters or the employees wanted to challenge this 8(f) agreement, they could have filed a representation petition.

Second, it is Raymond's position that the fact that Raymond and the Carpenters had a

lawful 8(f) agreement renders moot the Painters' claim as to requiring Raymond to provide alternate benefits coverage. In its remand, the D.C. Circuit noted that nothing in its decision was intended to question the Board's determination that Raymond and the Carpenters were free to enter into an 8(f) agreement after October 2. Raymond Interior Systems, Inc., supra, 812 F.3d at 182. This impacts the Painters' claim because the Board's determination permitted Raymond to continue providing benefits coverage under the Carpenters agreement after October 2, 2006, instead of providing alternate benefits coverage, and this was not challenged by the Painters in the proceedings before the Board. The Board's not requiring Raymond to provide alternative benefits coverage was a proper exercise of the Board's discretion in fashioning remedies.

II. FACTUAL SUMMARY PERTINENT TO MOTION FOR RECONSIDERATION

The most recent CBA between Raymond and the Painters to which Raymond was a signatory was the Southern California Drywall Finishers Joint Agreement that was effective from October 1, 2003, through September 30, 2006 ("2003-2006 WWCCA/Painters CBA"). This CBA covered Raymond's drywall finishing employees and it is undisputed that it was entered into pursuant to Section 8(f) of the Act. Raymond Interior Systems, Inc., 354 NLRB No. 85 (2009), slip op. at p. 7.

In May 2006, Raymond's CEO, Travis Winsor, decided to terminate Raymond's collective-bargaining relationship with the Painters. As a result, on May 24, Winsor notified the Painters and the employer association of which it was a member that Raymond was resigning its membership and intended to terminate the 2003-2006 WWCCA/Painters CBA effective September 31, 2006. Id., slip op. at p. 8.

After giving notice to the Painters and the WWCCA, in order to resolve disputes arising under Raymond's existing CBA with the Carpenters stemming from Raymond's intended termination of its Painters' CBA, Raymond and the Carpenters entered into a Confidential

Settlement Agreement on September 12, 2006. This agreement stated:

Raymond and the Carpenters entered into a September 12, 2006 "Confidential Settlement Agreement," that stated, in part:

> WHEREAS, disputes and grievances have arisen between the parties about proper assignment of drywall finishing and other work to the proper trade, craft, and group of employees, and the parties desire to settle said disputes through a confidential settlement agreement
>
> NOW, THEREFORE, for and in consideration of the mutual promises and agreements set forth, the parties agree as follows:
>
> 1. Raymond agrees to sign the Southern California Drywall/Lathing memorandum agreement 2006–2010.
>
> 2. At the expiration of Raymond's agreement with Painters District Council No. 36 on September 30, 2006, Raymond agrees that to the fullest extent permitted by law it will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and employees.

Raymond Interior Systems, 354 NLRB No. 85, slip op. at p. 7; Resp. Exh. 5 (emphasis added).

It is undisputed that Raymond lawfully withdrew recognition from the Painters as the collective bargaining representative of its drywall finishing employees covered by the 2003-2006 WWCCA/Painters CBA effective September 30, 2006, and lawfully terminated this Section 8(f) agreement. Raymond Interior Systems, Inc., 354 NLRB No. 85, slip op. at pp. 7-9.)

It is also undisputed that the Section 8(a)(2) violation found by the ALJ that was adopted by the Board occurred on October 2, 2006. Raymond Interior Systems, 354 NLRB No. 85 (2009) and Raymond Interior Systems, 357 NLRB 2044, 2045 (2010).

III. LEGAL ARGUMENT

A. RAYMOND HAD A LAWFUL PRE-EXISTING 8(F) AGREEMENT WITH THE CARPENTERS AS OF OCTOBER 1, 2006 BY VIRTUE OF THE CONFIDENTIAL SETTLEMENT AGREEMENT.

In the proceedings before the ALJ, the Board, and D.C. Circuit, Raymond contended that, as of October 1, 2006, it lawfully recognized the Carpenters as the representative of the drywall finishing employees under Section 8(f) by virtue of the Confidential Settlement Agreement between Raymond and the Carpenters. The ALJ rejected Raymond's position, and found this

agreement violative of Sections 8(a)(2).

The ALJ rejected Raymond's contention that upon expiration of the Painters' 8(f) agreement, and effective October 1, the Confidential Settlement Agreement with the Carpenters created a Section 8(f) agreement covering Raymond's drywall finishing employees. The ALJ based this finding on the specious reasoning that: (1) the phrase "to the fullest extent permitted by law" in the settlement agreement meant that Raymond intended to establish a 9(a) relationship covering its drywall finishing employees; (2) the settlement agreement did not "constitute" a collective bargaining agreement; and (3) that entering into this settlement agreement was unlawful because it was done so during the term of the Painters' CBA. (354 NLRB No. 85, slip op. at pp. 19-22.)

Neither substantial evidence nor applicable Board precedent supported the ALJ's findings. Raymond previously addressed the ALJ's errors in the exceptions and supporting brief filed with the Board by Raymond, and will not be repeated herein. Raymond will, however, address the ALJ's findings that the Confidential Settlement Agreement did not "constitute" a collective bargaining agreement. Likewise, Raymond will also take issue with the ALJ's erroneous finding that entering into this settlement agreement was unlawful because it was done during the term of the Painters' CBA.

Here, the record does not support the ALJ's refusal to accept the Confidential Settlement Agreement as "constituting" a collective-bargaining agreement. The ALJ inexplicably reasoned that "nothing in the document's preamble suggests the parties intended to create a collective-bargaining agreement or even meant to establish terms and conditions of employment." (354 NLRB No. 85, slip op. at p. 21.) However, the ALJ completely ignored the express language of Paragraph 2 of the Confidential Settlement Agreement that unequivocably states that Raymond "will apply the Southern California Drywall/Lathing Agreement to its drywall finishing work and

employees." See Resp. Exh. 5 (emphasis added). Clearly, the import of this language is to establish the "terms and conditions" that would apply to the drywall finishing employees, and it was undisputed that the Drywall/Lathing Agreement contains terms and conditions of employment.

While the ALJ wrongly concluded that "there is no record evidence herein that the parties intended their settlement agreement to constitute a collective-bargaining agreement, [footnote omitted] the term bargaining unit is not mentioned and the document bears no expiration date" (354 NLRB No. 85, slip op. at p. 21), the ALJ's conclusion is contrary to the substantial evidence. First, as noted above, the Confidential Settlement Agreement in Paragraph 2 expressly identifies the drywall finishing employees, and sufficiently describes the bargaining unit. Second, the ALJ ignored the fact that the Drywall/Lathing Agreement specifically referenced in the Confidential Settlement Agreement contained an expiration of June 30, 2010. See Resp. Exh. 4.

Under Board law, the Confidential Settlement Agreement, by referring to and incorporating the terms and conditions of the Southern California Drywall/Lathing Agreement to the drywall finishing employees bargaining unit, constituted a collective bargaining agreement. See, e.g., Local Union No. 530 (Cape Construction Company, Inc.), 178 NLRB 162, 164 (1969) (Parties' oral agreement that terms of mainline pipeline collective bargaining agreement "would be enforced on this particular job" and construction project would be governed by the terms of the agreement was "legally sufficient" to make mainline contract operative as a collective bargaining agreement between parties.)

Moreover, the ALJ exceeded his authority in finding that "as counsel for the Painters Union persuasively argues, if, as argued, the parties did enter into a collective-bargaining agreement via the confidential settlement agreement, such would have been an unlawful act." Raymond Interior Systems, supra, 354 NLRB No. 85, slip op. at p. 21. In so finding, the ALJ

ignored the key fact that the Complaint did not allege that the entering into of the Confidential Settlement Agreement constituted a violation, and the General Counsel never amended the Complaint to so allege. Under well-established Board precedent, the ALJ could not base a violation of Sections 8(a)(1) and (2) on the argument or alternative theories of Painters' counsel. See e.g., ATS Acquisition Corp., 321 NLRB 712 (1996). Additionally, the ALJ's ultra vires finding is contrary to the Board's decision in Acme Tile & Terrazzo Co., 306 NLRB 479 (1992). In Acme Tile, the ALJ and the Board found that an addendum by employer-members binding them to a Section 8(f) multi-employer association agreement with a bricklayers local union, that was signed during the term of the association's Section 8(f) carpenters agreement, but which became effective after expiration of an 8(f) carpenters agreement, was a lawful 8(f) agreement. Id. at 480 ("we agree with the judge that the Respondent Association lawfully entered into an 8(f) agreement with Bricklayers Local 1").

Based on the foregoing, a lawful Section 8(f) agreement between Raymond and the Carpenters covering the drywall finishing employees existed as of October 1, 2006. See Deklewa, supra, 282 NLRB at 1385 fn. 41 (collective bargaining agreements in the construction industry are presumed to be 8(f) contracts).

B. RAYMOND'S LAWFUL PRE-EXISTING 8(F) AGREEMENT WITH THE CARPENTERS CANNOT BE VITIATED OR RENDERED UNLAWFUL BY 8(A)(2) CONDUCT OCCURRING ON OCTOBER 2, 2006.

Even if Raymond engaged in subsequent conduct violative of Section 8(a)(2) on October 2, 2006 this would not invalidate this pre-existing Section 8(f) agreement under extant Board precedent. An 8(f) agreement continues to remain valid where the 8(a)(2) assistance or support occurred wholly after the parties had already executed their Section 8(f) agreement. Zidell Explorations, Inc., 175 NLRB 887 (1969). Thus, in Zidell, the Board stated that,

> [We] do not read Section 8(f) as permitting, much less as requiring, the invalidation of a prehire contract, allowable under that Section and valid when entered into, simply because

> of subsequent acts of unlawful assistance for which the employer party to the contract has alone been found responsible . . . Section 8(f), if it is true, imposes as one of the conditions that an employer may "make" such an agreement only with a labor organization "not established, maintained, or assisted by any action defined in Section 8(a) of the Act as an unfair labor practice." That condition, however, speaks only as of the time of the making of the contract and obviously refers to antecedent unfair labor practices.

Id. at 888 (emphasis in original). See also Luke Construction Company, 211 NLRB 602, 605 (1974) (post 8(f) contract assistance not a proper basis for ordering withdrawal of recognition or rescission of an otherwise valid Section 8(f) agreement). As the D.C. Circuit pointed out, the facts in this matter are materially indistinguishable from those in Zidell and the authorities relied upon by the Board in Zidell. See Raymond Interior Systems, Inc., supra, 812 F.3d at 181-182. Accordingly, there is no basis for the Board to contend that the Board's holding in Zidell is inapplicable herein.

Thus, unless the Board overrules Zidell, it must find that a lawful Section 8(f) agreement between Raymond and the Carpenters covering the drywall finishing employees existed as of October 1, 2006, and that this 8(f) agreement was not vitiated or rendered unlawful by any 8(a)(2) conduct occurring on October 2, 2006. The Board should not overrule Zidell.

First, overruling Zidell and invalidating the 8(f) agreement between Raymond and the Carpenters because of subsequent acts of unlawful assistance for which Raymond alone has been found responsible would, as the Board expressly acknowledged in Zidell, be "constitutionally suspect." Zidell, supra, 175 NLRB at 888.

Second, vitiating a § 8(f) agreement based on subsequent unlawful labor practices will have a significant detrimental impact on employers and unions in the construction industry. In Staunton Fuel & Material, Inc. d/b/a Central Illinois Construction, 335 NLRB 717 (2001), the NLRB held that a construction industry union could establish a Section 9(a) relationship by means of a written agreement where:

> (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support.

Id. at 719-720. Staunton Fuel allows, and even encourages, construction industry employers and unions to convert their collective bargaining representative status and agreement from one governed by § 8(f) to one covered by § 9(a). A rule invalidating a lawful § 8(f) agreement based on subsequent § 8(a)(2) violations will discourage employers and unions from even attempting this conversion for fear of having their agreements invalidated. Construction industry employers and unions will be hesitant to gamble and risk losing everything if their valid § 8(f) agreement is invalidated by the NLRB as a punishment, because they somehow erred in converting to a § 9(a) relationship.

C. THE PAINTERS' OBJECTION TO THE BOARD NOT REQUIRING RAYMOND TO PROVIDE ALTERNATE BENEFITS COVERAGE SHOULD BE REJECTED.

The Painters' contention that the Board abused its discretion in not ordering Raymond to provide alternate benefits coverage should be rejected.

The Painters' claim should be rejected because it is moot since Raymond and the Carpenters had a lawful 8(f) agreement which permitted Raymond to provide benefits coverage under its agreement with the Carpenters.

Even if the Board does not find that Raymond and the Carpenters had a lawful 8(f) agreement, the Board was within its discretion in not requiring Raymond to provide alternate benefits coverage. As acknowledged by the Board, its precedent has not always been consistent in requiring alternate benefits coverage to remedy unlawful employer assistance and recognition of a union. Nonetheless, as the Board pointed out herein, "alternate benefits coverage is not required to effectuate the key prescription in unlawful assistance and recognition cases: that an employer not recognize a union as a 9(a) representative of its employees unless and until an

uncoerced majority of employees favors such representation." Raymond Interior Systems, supra, 357 NLRB at 2044.

Section 10(c) of the Act "charges the Board with the task of devising remedies to effectuate the policies of the Act" and the "Board's power is a broad discretionary one." Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 215 (1964). Not requiring provision of alternate benefits coverage effectuates the policies of the Act because it is not necessary to remedy the 8(a)(2) violations. Moreover, the Board has broad discretion to make that decision under Section 10(c), and doing so does not amount to an abuse of discretion or an abuse of power.

Furthermore, the Painters did not previously make this argument to the Board or object to this aspect of the Board's order. The Painters also did not move for reconsideration of the Board's order. Because the Painters failed to file a motion for reconsideration, the Painters waived any challenge to the Board's remedy eliminating the alternate benefits requirement.

Moreover, the D.C. Circuit stated that "nothing in our decision is meant to question the Board's determination that Raymond and the Carpenters were free to enter into an 8(f) agreement after October 2." Because the parties were free to enter into such an agreement, it does not make any sense for the Board to have required that Raymond provide alternate benefits coverage when Raymond and the Carpenters could have obviated the need for such coverage by simply entering into an 8(f) agreement after October 2.

Finally, the Board's order not requiring Raymond to provide alternate benefits coverage issued in 2011 and involved events occurring in 2006. Given the passage of time, for the Board to now reverse its position and require Raymond to provide alternate benefits coverage would be inequitable and disruptive. To the extent Raymond continued benefits coverage under the Carpenters agreement, it would be inequitable because Raymond detrimentally relied on the Board's order allowing it to do so. It would also be disruptive to the affected drywall finishing

employees, their families and dependents should Raymond now be required to provide different benefits coverage.

IV. CONCLUSION

For the reasons noted above, Raymond Interior Systems, Inc. requests that the Board find that Raymond and the Carpenters had a lawful 8(f) agreement effective October 1, 2006. Raymond also respectfully requests that the Painters' claim challenging the Board's refusal to order alternate benefits coverage be rejected.

Respectfully submitted,

DATED: July 26, 2016

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CERTIFICATE OF SERVICE

I, Richard S. Zuniga, declare as follows:

1. I hereby certify that on July 26, 2016, I filed **RESPONDENT RAYMOND INTERIOR SYSTEMS' STATEMENT OF POSITION** in Cases 21-CA-37649 and 21-CB-14259, via E-Filing.

2. I hereby certify that on July 26, 2016, I caused to be served true copies of **RESPONDENT RAYMOND INTERIOR SYSTEMS' STATEMENT OF POSITION** in Cases 21-CA-37649 and 21-CB-14259, by first-class U.S. Mail and by E-Mail on the following parties:

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I hereby certify that the foregoing is true and correct.

Executed this 26th day of July 2016, at Los Angeles, California.

Richard S. Zuniga

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